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Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

WALTER BLOUNT, JR.

Petitioner,

vs.

PEOPLE OF STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was denied fundamental due process and confrontational rights when the State of Illinois introduced the hearsay statement of Brian Moore and used it as the basis for its "gangbanging" arguments.

2. Whether petitioner was denied fundamental due process by the State of Illinois' improper closing argument.

THE LIST OF ALL PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF ILLINOIS

The parties to the proceedings in the Supreme Court of Illinois were respondent People of the State of Illinois and petitioner Walter Blount, Jr.

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Petitioner Walter Blount, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

CITATION OF OFFICIAL AND UNOFFICIAL REPORTS

The decision of the Supreme Court of Illinois was entered on October 3, 2001, is not officially reported, and is found at 2001 Ill. LEXUS 1366. The decision of the Appellate Court of Illinois was entered on June 26, 2001 and is not officially reported. The decision of the Appellate Court is found in the Appendix. The actions of the Circuit Court of Cook County, Illinois are unreported.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Illinois was entered on October 3, 2001. The Court's jurisdiction is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states that:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due

process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

The Fourteenth Amendment states, in part, that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 5, 1997, the People of Illinois, by a grand jury, charged Mr. Blount, Marcus Blackwell, and Brian D. Holmes in a four-count indictment. Count 1 charged First Degree Murder, in violation of 720 ILCS 5/9-1-A(1). Count 2 charged First Degree Murder, in violation of 720 ILCS 5/9-

1-A(1). Count 3 charged Attempt First Degree Murder, in violation of 720 ILCS 5/8-4. Count 4 charged Aggravated Battery with a Firearm, in violation of 720 ILCS 5/12-4.2-A(1). C-00024-00028. Mr. Blount was released on bond during pretrial and trial proceedings.

Mr. Blackwell was tried and convicted by a jury on March 11, 1999. C-00005. He was sentenced to 84 years incarceration on Count I and 25 years incarceration on Count III, with Counts II and IV merging. C-00007.

Mr. Holmes, a cooperating witness who testified against both Mr. Blackwell and Mr. Blount, pled guilty on April 21, 1999 and was sentenced to 6 years incarceration, with credit of 654 days time served.

On April 8, 1999, a jury found Mr. Blount guilty on all Counts. C-00008. On May 26, 1999, the lower court sentenced Mr. Blount to consecutive sentences of 45 years incarceration on Count 1 (First Degree Murder) and 20 years incarceration on Count III, with Counts II and V merging. C-00008.

This is a petition for writ of certiorari that should be granted. This record presents serious issues of constitutional concern. Mr. Blount was denied fundamental due process and fundamental confrontation because the trial court permitted improper hearsay evidence of gang affiliation and motivation and because it allowed improper argument by the People during closing argument.

ARGUMENT

A. PETITIONER WALTER BLOUNT, JR. WAS DENIED FUNDAMENTAL DUE

PROCESS BY THE INTRODUCTION OF IMPROPER HEARSAY TESTIMONY WHICH WAS THE BASIS FOR THE STATE'S IMPROPER AND INADMISSIBLE "GANGBANGING" ARGUMENTS.

The lower court erred by allowing the jury to hear the out-of-court hearsay statement of Brian Moore. Mr. Holmes testified that, on the day of the shooting, Mr. Moore told him and the others in the automobile that "some Stones had been shooting at him in a Delta 88." There is no question but that this is an out-of-court statement offered for the truth. As a result, this statement was inadmissible hearsay. See E. Cleary, McCormick on Evidence §246 at 584 (2d ed. 1972) (defining hearsay as "testimony in court, or written evidence, of a statement made out-of-court, the statement being offered as an assertion to show the truth of the matter asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.")

The lower court improperly ruled that the Moore statement was admissible under the coconspirator exception to the hearsay rule. The lower court reasoned that, but for Moore's statement to Mr. Holmes and the others, the shooting would not have occurred. In other words, the lower court ruled, as a matter of law, that Mr. Moore's words set the crime into action.

The Appellate Court held that this statement was "classic" hearsay and that it was not admitted for its truth. The problem with this postulation is that the statement was used for its truth at trial and on appeal. The State trumpeted a "gang war" without any admissible evidence to support it.

Obviously, Mr. Moore's statement to Mr. Holmes was not of a conspiratorial nature. Also obviously, the Moore statement was offered for its truth.

The Moore statement provided a motive about why this shooting occurred. There was no other motive evidence. Without Mr. Moore's statement, the jury would have been left with the highly impeached testimony of Mr. Holmes. For example, Mr. Holmes testified that he did not inform the police or State's Attorney that there was a fourth person in the vehicle. Mr. Holmes did not tell the officers that he spent 9 hours driving around Chicago on the day of the shooting. Mr. Moore could not account for his time in Chicago. Mr. Holmes testified that they spent all of this time in Chicago without getting any gas or stopping to use the restroom. Moreover, Mr. Blount provided credible witnesses who testified that he was in their presence during the time that Mr. Holmes testified that he was with him.

Perhaps the most serious consequence of the admission of the Moore hearsay statement was the introduction of gang affiliation and "gangbanging," the prosecution's main theme during trial. Without Mr. Moore's statement, there was no evidence that this particular shooting was gang inspired. Without anything more, the skeletal evidence of gang association leaves the jury to infer that gang membership is equivalent to drive-by murder. Such guilt by association is prohibited by our Constitution and cannot be used as a tool in our criminal justice system. See United States v. Rodriquez, 925 F.2d 1049, 1053-54 (7th Cir. 1991).

There is a strong prejudice against street gangs. Courts have repeatedly recognized "the insidious quality" of evidence of gang membership as well as "the damage it can do." United States v. Sargent, 98 F.3d 325, 328 (7th Cir.

1996). Because there is a "substantial risk of unfair prejudice attached to gang affiliation evidence," courts must consider the admissibility of such evidence very carefully. United States v. Irvin, 87 F.3d 860, 864 (7th Cir. 1996); Rodriguez, supra.; United States v. Lewis, 910 F.2d 1367, 1372 (7th Cir. 1990) (evidence of gang membership is likely to be "damaging to [defendant] in the eyes of the jury").

Evidence of gang affiliation is relevant only if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." People v. Lucas, 151 Ill.2d 461, 603 N.E.2d 460 (1992). There must be proof that any alleged gang membership is in some way related to the crime with which defendant is charged. People v. Smith, 141 Ill.2d 40, 565 N.E.2d 900 (1991).

Our courts are not hesitant to throw out criminal convictions based upon the inadmissibility of gang-related evidence. Smith, supra; People v. Colon, 249 Ill.App.3d 141, 618 N.E.2d 1067 (1st Dist. 1993).

B. PETITIONER WALTER BLOUNT, JR. WAS DENIED FUNDAMENTAL DUE PROCESS AS A RESULT OF THE STATE'S IMPROPER CLOSING ARGUMENT.

The State's closing argument was inappropriate. A fundamental rule regarding the propriety of a closing argument is that the argument cannot go outside the record. United States v. Latimer, 511 F.2d 498 (1975). In closing rebuttal argument, the State told the jury that Mr. Holmes testified against Mr. Blackwell. There was no record support for this statement. Mr. Blackwell's trial was severed from Walter's trial. It was inappropriate to attempt to substantiate

Mr. Holmes' testimony by reference to a codefendant's case. The State used this argument to bolster Mr. Holmes' credibility. The plain import of the argument is that, because Mr. Holmes testified against Mr. Blackwell, he was telling the truth against Mr. Blount.

This argument was clearly improper and prejudiced Mr. Blount. Williams v. State of Alaska, 629 P.2d 54 (1981).

This case requires a new trial.

CONCLUSION

A petition for a writ of certiorari should issue and the decision of the Supreme Court of Illinois against Walter Blount, Jr. should be reversed and remanded for further proceedings.

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THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
WALTER BLOUNT,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County

97 CR 21738

Honorable Thomas M. Tucker,
Judge Presiding.

ORDER

Following a jury trial, defendant, Walter Blount, was found guilty of first degree murder, attempted murder, and aggravated battery with a firearm. He was sentenced to 45 years' imprisonment for the first degree murder conviction and a consecutive 20 years' imprisonment for the attempted murder conviction. Defendant appeals contending that the trial court erred by admitting hearsay testimony, failing to dismiss certain jurors, allowing inappropriate closing argument by the State, and imposing an excessive sentence.

The State's evidence showed that defendant, Brian Holmes, Marcus Blackwell, and KeShawn Huston were members of a street gang known as the 4 Corner Hustlers. The territory of the 4 Corner Hustlers was described as 16th Street and Randolph Streets in Maywood, Illinois. A rival gang known as the Black P-Stones occupied neighboring territory around the intersection of 19 Street and Van Buren Street in Maywood, Illinois. Testimony revealed that the two rival gangs were at war.

On July 9, 1997, Holmes testified that he got together with Huston at approximately 10:00 a.m. The two went and got the "block car," used by 4 Corner Hustlers to drive around the block, which was a burgundy Chevrolet Citation. The block car had a 'peeled" steering column which allowed the car to be started absent the use of keys. At approximately 12:00 noon, Huston and Holmes picked defendant and Blackwell at 16th Street and Randolph Street in Maywood. Defendant drove the car with Blackwell in the front passenger seat and Huston and Holmes in the rear seats.

According to Holmes, testimony, the four drove the car into the City of Chicago where they rode around until approximately 9:30 p.m. and then returned to Maywood. As the four rode around in Maywood, they ran into Brian Moore between 10th Street and Randolph Street. Moore was also a member of the 4 Corner Hustlers. The car was pulled over so that the occupants could communicate with Moore. Moore told the rest of the group that he had been shot at by members of the Black P-Stone gang who were riding in a "Brown [Delta] "88."

Upon hearing this information, the group of four proceeded to 16th Street and Randolph Street in Maywood where Blackwell stored a .380 semi-automatic hand gun in the bushes. Moore did not accompany Holmes, Huston, Blackwell, and defendant. Blackwell exited the car to retrieve the .380, he then stuffed it under his shirt, and re-entered the vehicle. With defendant driving and Blackwell in the front passenger seat, the four individuals drove over to 19th Street and Van Buren Street in Maywood which is the territory of the Black P-Stones. According to Holmes, they drove the car past the intersection of 19th Street and

Van Buren Street approximately three or four times and circled around for an additional pass.

On the final pass, defendant slowed the vehicle down in the middle of the intersection and stated, "I think that's them." Wielding the .380, Blackwell placed his arm outside the vehicle and discharged between four and six shots at a crowd of people on the east side of the street. The crowd consisted of between 9 and 20 young people who were standing in front of Mary Harris' home located at 1608 South 19th Street, Maywood. After the drive-by shooting, respondent allegedly sped off at approximately 40 miles per hour.

The bullets fired by Blackwell struck two victims. Cary Rouse, age 18, was shot in the side of his body and was critically injured requiring six weeks recovery in the hospital. The other victim was Mary Harris, age 71, who was attempting to shoo the group of youths away from her home. Samuel Davis, Harris' common law husband, testified that Harris came into the bedroom at approximately 11:30 p.m. and told him that she had been shot. She was taken to the hospital where she was later pronounced dead. Dr. Emil Choi, a forensic pathologist, testified that Harris died of a gun shot wound, which penetrated her heart.

Prior to the shooting at approximately 11:15 p.m., Kecia Williams, Nayania Poole, and Antoinette Hughes testified that they were standing in front of Harris' home on 19 and Van Buren. The girls testified that Harris came to the front of her home and asked the group standing outside to leave. In compliance with Harris, request, the girls left the group, proceeded west down Van Buren Street, and turned north onto 11th Street. Williams

testified that approximately 15 minutes after leaving Harris, home, she saw a vehicle going northbound on 11th Avenue. Poole stated that the automobile was a burgundy Chevrolet Citation. Hughes corroborated the identification of the vehicle in her testimony.

The girls stated that the vehicle approached them at a slow speed and all three of them identified defendant as the driver of the vehicle. Williams and Hughes stated that Holmes was riding in the back seat. Hughes asked defendant for a ride home and he just smiled and kept on going.

At the crime scene, Alan Morrison, an evidence technician from the Cook County Sheriff's department, testified that he found five shell casings and one live round from a .380 semi-automatic revolver. The shell casings were found east of the intersection of 19th Street and Van Buren Street. At the front of Harris, house, Morrison testified that he found a bullet hole in the screen of the front door and blood droplets going from the front door to the northeast bedroom inside the home.

At approximately 11:20 p.m. on the evening of July 9, 1997, John Mazariegos, of the Maywood Police Department, testified that he received a call of shots fired. Mazariegos also stated that three black males driving a red Chevy hatchback were described as the possible offenders. The officer stated that he continued to search for the vehicle until the morning of July 10, 1997. In the area of 9th Avenue and Randolph Street, Mazariegos observed the vehicle and began pursuit. When the vehicle was approximately one block ahead of him, he saw the doors of the vehicle open up and three black males jump out while the car was still moving. Mazariegos was

unable to apprehend any of the subjects but the abandoned vehicle was confirmed to be a burgundy Chevrolet Citation. Eventually, defendant, Holmes, and Blackwell were all apprehended.

Defendant and Holmes were later placed in a police line up. Williams, Poole, and Hughes were brought in to view the lineup of the offenders. All three women picked defendant out of the line up and identified him as the driver of the vehicle on the night of the shooting. Williams and Hughes also identified Brian Holmes as a passenger in the back seat of the car.

While in custody at the Maywood Police station, Holmes stated that he had been read his Miranda rights by the Maywood police and by the assistant State's Attorney. Holmes testified that he waived his rights and informed the police and the assistant State's Attorney what happened on the evening of the shooting. After he had been charged with first degree murder, Holmes said that he accepted an offer by the State in exchange for his truthful testimony against Defendant and Blackwell. In exchange for his testimony, Holmes would be convicted of aggravated battery with a firearm and would serve six years in the penitentiary. Holmes stated that he accepted the offer.

At the end of trial, the jury found defendant guilty of first degree murder, attempted murder, and aggravated battery with a firearm. He was sentenced to 45 years' imprisonment for first degree murder and a consecutive 20 years, imprisonment for attempted murder. Sentencing for defendant's aggravated battery conviction was merged into his first degree murder sentence.

On appeal, defendant contends that the trial court erred by improperly admitting hearsay evidence, failing to dismiss certain jurors, allowing improper closing argument by the State, and sentencing defendant excessively. We examine each question raised by defendant in turn.

First, defendant claims that the trial court erred by admitting the hearsay statement of Brian Moore. As noted above, Holmes testified that he, defendant, Huston, and Blackwell pulled their vehicle over on the street to speak with Brian Moore, who was a fellow 4 Corner Hustler. Holmes said that Moore told them that he had been shot at by the Black P-Stones who approached him in a "Brown '88."

According to defendant, Moore's statement is hearsay because it was offered to prove the truth of the matter asserted. Defendant also claims that the statement does not fall within the co-conspirator's exception to the hearsay rule. He further contends it was error to admit Moore's statement because it introduced an unduly prejudicial gang theme to the shooting which denied defendant a fair trial. The State responds by arguing that the statement was properly admitted as non-hearsay and was also properly admitted under the co-conspirator's exception the hearsay rule.

As correctly pointed out by the parties, [t]he definition of hearsay *** is generally accepted to be testimony of an out-of court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of -court asserter. [Citations.]" People v. Rogers, 81 111. 2d 571, 577, 411 N.E.2d 223 (1980). "Testimony about an out-of court statement which is used for a purpose other than to prove

the truth of the matter asserted in the statement is not hearsay. [Citation.]" People v. Williams, 233 Ill. App. 3d 1005, 1016, 599 N.E.2d 1033 (1992). Further, "[i]f out-of-court statements are offered to prove the resultant effect of those words on the listener's state of mind, then the speaking of the words is independently relevant regardless of the truth of their content and the statements are admissible as non-hearsay. [Citations.]" People v. Kline, 90 Ill. App. 3d 1008, 1012, 414 N.E.2d 141(1980).

We agree with the State on this question that Moore's statement can be appropriately categorized as non-hearsay. While defendant claims that the statement is "classic" hearsay, we conclude that Moore's testimony was not offered to prove the truth of the matter asserted. The State did not seek admission of the statement to prove that Moore Was, in fact, fired upon by Black P Stones riding in a "Brown '88." Rather, the statement was offered to show its effect on the listener's state of mind. In our view, admitting Moore's statement for the purpose of demonstrating defendant's motive to retaliate against the Black P-Stones was not hearsay.

Although the record indicates that the trial court admitted Moore's statement based on the co-conspirator exception to the hearsay rule, we can affirm the trial court's ruling on any ground. "A trial court Is order may be sustained on appeal for reasons other than those given by it.,' People v. Lieberman, 186 Ill. App. 3d 277, 282, 542 N.E.2d 894 (1989). Thus, a discussion over whether the statement was properly admitted under the co-conspirator's exception is unnecessary because we conclude that the statement was properly admitted as non-hearsay under the court I s decision in Kline, 90 Ill. App. 3d at 1012.

Defendant also claims that he was prejudiced by the admission of Moore's statement due to the stigma of gang affiliation in the eyes of the jury. The principle authority relied upon by defendant is People v. Smith, 141 Ill. 2d 40f 565 N.E.2d 900 (1990), and People v. Colon, 249 Ill. App. 3d 141, 618 N.E.2d 1067 (1993) These cases offer little assistance to defendant's position.

Smith is distinguishable because, in that case, the State attempted to show that defendant, while incarcerated, was a member of a street gang and that he killed an assistant warden because of the warden's intolerance toward gangs. The supreme court noted that the only evidence admitted in support of the above theory was that a variety of gang related activity existed in the Illinois prison system. The court held that, standing alone, the evidence did not support a reasonable inference that defendant was a member of a gang and that such evidence was inflammatory and of little probative value. Smith, 141 Ill. 2d at 59.

In Colon, the State attempted to show that defendant and murder victim were members of rival gangs and that the shooting of the victim took place in gang territory. The appellate court held that merely demonstrating that an area is frequented by gangs and drive-by-shootings is insufficient to allow evidence of gang membership as motive for a crime committed in the area. Colon, 249 Ill. App. 3d at 146. The court, relying on the supreme court's decision in People v. Lucas, 151 Ill. 2d 461, 480, 603 N.E.2d 460 (1992), further concluded that "there must be sufficient evidence demonstrating that the crime at issue was related to gang involvement or gang activity and that the defendant was

aware that gang activity was involved. [Citation. Colon, 249 Ill. App. 3d at 146-47. The facts in Smith and Colon are distinguishable from those in this case.

Here, Holmes testified that everyone in the vehicle, including defendant, were 4 Corner Hustlers. Rouse, a victim and Black P Stone, testified that there was a war going on between the Black P Stones and the 4 Corner Hustlers. Rouse further stated that he was standing-in front of Harris, house with approximately seven other Black P-Stones when the shooting occurred. Further, Holmes testified that Moore told him, defendant, Huston, and Blackwell that Moore had been shot at by Black P-Stones. Holmes continued to state that he, defendant, Huston, and Blackwell responded by retrieving the .380 semi-automatic handgun from the bushes. Holmes said that, once the gun had been retrieved, the group drove into Black P-Stone territory to shoot at them.

In this case, there was sufficient evidence, independent of Moore's statement, that the crime was related to gang activity and that defendant was aware that gang activity was involved. Holmes, testimony, standing alone, satisfies the criteria required in Lucas. Thus, we disagree that the admission of evidence establishing gang membership was prejudicial to defendant in this case. Further, we do not find the admission of such evidence amounted to reversible error.

We next examine the question of whether the trial court erred by not dismissing three prospective jurors for cause. Defendant claims that the three jurors, Alice Jones, Emily Koder, and Joe Bradley, should have been excluded by the trial court for cause because they expressed doubts about whether they could be fair and impartial jurors.

Specifically, Jones and Koder disclosed that they had been victims of crime, and Bradley alluded to a negative experience with his attorneys during litigation involving a personal injury. As a result, defendant claims that he was denied a fair trial because the trial court refused to excuse the three jurors for cause. Defendant's argument on this question is without merit for the following reasons.

First, defendant has not alleged that he exhausted his peremptory challenges excusing any of the three jurors or that an objectionable juror was forced upon him after he had exhausted his peremptory challenges. People v. Alksnis, 291 Ill. App. 3d 347, 355, 682 N.E. 2d 1112 (1997), People v. Marts, 266 Ill. App. 3d 531, 540, 639 N.E.2d 1360 (1994), People v. Suter, 292 Ill. App. 3d 358, 370, 685 N.E. 2d 1023 (1997). Such an allegation is necessary in order to challenge an alleged error by the trial court in failing to dismiss a juror for cause. Suter, 292 Ill. App. 3d at 370. In this case, there is no evidence in the record that defendant exhausted his peremptory challenges. On this basis alone, we conclude that the trial court did not err by failing to excuse the subject jurors for cause.

Second, the supreme court has stated, "[a] n equivocal response by a prospective juror does not necessitate striking the prospective juror for cause where the prospective juror later states that he will try to disregard his bias. [Citation]." People v. Hobley, 159 Ill. 2d 272, 297, 637 N.E.2d 992 (1994) An examination of the three jurors statements reveals the following testimony.

Alice Jones, a prospective juror, stated the following:

"THE COURT: Anything about the event [sister's rape] that would keep you from being fair and impartial to either side in this case?

MS. JONES: I'll try not to.

THE COURT: Do you hold any moral religious, or ethical beliefs that would keep you from being fair and impartial to either side in this case?

MS. JONES: No."

Our impression of this testimony indicates that Jones would try to be fair and impartial if selected as a juror. The record shows defendant never moved to excuse Jones for cause but did use a peremptory challenge against her. Because Jones indicated a willingness to be fair, under the Hobley decision there was no necessity to excuse her for cause. Thus, we find no error.

Emily Koder, another prospective juror, stated the following:

"THE COURT: You have been the victim of a crime. Tell us about that.

MS. KODER: I was just 17 years old; and I was, uh, it was an attempted rape.

THE COURT: Anything about that that would keep you from being fair and impartial to either side in this case?

MS. KODER: I would try not to be.

THE COURT: Very good. You indicated an immediate family member or close friend?

MS. KODER: My sister was - somebody took a screwdriver to her throat and tried to hurt her.

THE COURT: Anything about that that would keep you from being fair and impartial to either side in this case?

MS. KODER: I would try not to."

Again, our impression of the questions and answers indicates that Koder would try to be fair and impartial if selected as a juror. Additionally, defense counsel conceded that Koder indicated that she would try to be fair. Specifically, defense counsel stated the following:

"THE COURT: [Emily Koder] That's the one with the sister with the screwdriver to the neck.

[Defense counsel]: She said she'll try to be fair."

Thus, under the standard set forth in Hobley above, the trial court properly denied defendant's request to excuse Koder for cause.

The final prospective juror, Joe Bradley, testified as follows:

"THE COURT: Do you hold any moral, religious or ethical beliefs that would prevent you from being fair and impartial to either side in this case?

MR. BRADLEY: I'm not sure, your Honor.

THE COURT: You will do your best to be fair to both sides and listen to the evidence, is that correct?

MR. BRADLEY: Yes. ***."

The above testimony reveals that Bradley would try to be fair if selected as a juror. Thus, under the standard articulated in Hobley, we find the trial court did not err by denying the motion to exclude Bradley for cause.

Third, the authority relied upon by defendant, People v. Johnson, 215 Ill. App. 3d 713, 726, 575 N.E. 2d 1247 (1991) is distinguishable. In Johnson, three veniremen all equivocated when they were asked by the trial court whether they could be fair and impartial. They further testified that they had all been-victims of crimes, that their family members had been victims of crimes, or that their friends had been victims of crimes, and that some of the crimes were violent ones. Specifically, when venireman Milkovic was asked whether the criminal incident he described would affect his ability to be fair he responded, "I hope not." When venireman Welch was asked whether the crimes perpetrated on his family and friends would impair his ability to be impartial, he responded, "Not really." Finally, when venireman Swope was asked whether or not he could be fair, He twice

responded, "I don't think so." Johnson, 215 Ill. App. 3d at 724-26.

The appellate court held that because these prospective jurors were all crime victims, or had friends or relatives who were crime victims, and because they equivocated when first asked whether they could be fair and impartial, the trial court should have dismissed them for cause. Johnson, 215 Ill. App. 3d at 725.

The facts in this case are not analogous. First, the prospective jurors in this case did not have the same exposure to criminal activity that those in Johnson did. Second, the jurors in the instant case stated that they could or would try to be fair and impartial. Thus, under Hobley, these jurors should not have been dismissed for cause. Hobley, 159 Ill. 2d 297. For the above reasons, we affirm the trial court's decision on this question.

We turn to the third question whether the comments of the prosecutor during closing argument were improper and prejudicial. Defendant alleges that, during the State's rebuttal argument, the prosecutor told the jury that Holmes testified against Blackwell. Defendant further contends that there was no evidentiary support for the prosecutors statement because Blackwell's trial was severed from defendant's. Thus, according to defendant, it was inappropriate for the State to attempt to substantiate Holmes' testimony by reference to Blackwell Is case. Defendant claims that, "the plain import of the argument is that because Mr. Holmes testified against Mr. Blackwell, he was telling the truth against Mr. Blount." Such error, according to defendant, was prejudicial, irreparably influenced jury deliberations, and deprived defendant of a fair trial.

Specifically, the assistant State's Attorney stated the following:

"[Assistant State's Attorney ("ASA")]: And then you have the additional evidence, the most damning evidence, one of (defendant's gang] members telling you about his participation. And keep in mind, when counsel keeps on telling you, six years, six years. This part was only half of the deal when he got done testifying today, or yesterday, the day before, excuse me, that concluded his obligation to the People of the State of Illinois. But he also testified against Blackwell. He testified against both these individuals.

(Defense counsel]: Objection, your Honor. Irrelevant.

THE COURT: Sustained. Sustained. It's stricken.

ASA: That was his offer that we made to him on behalf of the People of the State of Illinois, to testify against those two individuals.

[Defense counsel]: Object again.

***

THE COURT: That. No that's overruled. Go ahead, sir."

We disagree with defendant that the above testimony was improper or prejudicial.

"It is well settled that great latitude is afforded a prosecutor during closing argument, [Citation], and that the propriety of the prosecution's remarks is generally left to the discretion of the trial court which determination shall be followed absent a showing of abuse of discretion. [Citation.] In closing argument, the prosecution may base its argument on the evidence presented or reasonable inferences therefrom, [citation] ***" People v. Morrison, 137 I11. App. 3d 171, 184, 484 N.E.2d 329 (1985).

First, the record reveals that the prosecutor made the above comment based upon the evidence presented. The record indicates the following testimony by Brian Holmes:

"Q [ASA] Sometime later you were made an offer by the People of the State of Illinois in exchange for your truthful testimony against [defendant] and Marcus-Blackwell?

A. [BRIAN HOLMES] Yes.

Q. What was the offer?

A. Aggravated battery, firearm, six years in the penitentiary.

Q. Did you accept that offer?

A. Yes.

Q. Today you have fulfilled your obligation?

***

A. Yes."

The testimony reveals that Holmes' deal was part of the record and the deal, as clearly established, required Holmes' testimony against defendant and Blackwell. "Arguments based on facts or reasonable inferences drawn from the facts are within the scope of proper argument even where they reflect unfavorably on the accused." People v. Manley, 222 Ill. App. 3d 896, 907, 584 N.E.2d 477 (1991.) In our view, therefore, the statement made by the prosecution was a fair comment based upon the evidence.

Further, the prosecutor's comment was made in response to defense counsel's attack on Holmes' credibility. A review of defendant's closing argument reveals that defendant sought to damage Holmes' credibility by informing the jury that Holmes only received a six year sentence in exchange for his testimony against defendant. In its brief, the State explains that the prosecutor's comment was made to remind the jury that Holmes was required to testify against defendant and Blackwell in exchange for the deal. Such comments are permitted when made in response to statements made by defense counsel. People v. Richardson, 123 Ill. 2d 322, 356, 528 N.E.2d 612 (1988), People v. Redd, 173 Ill. 2d 1, 32, 670 N.E. 2d 583 (1996) Thus, the comment was also proper on this basis.

In addition, even if the prosecutor's comment could be considered improper, "improper remarks generally do not constitute reversible error unless they

result in substantial prejudice to the accused." People v. Baptist, 76 Ill. 2d 19, 29, 389 N.E.2d 1200 (1979). As previously stated by this court:

> "In determining whether the prosecutor's comments or arguments constituted prejudicial error, the test employed is whether the jury would have reached a contrary verdict had the improper remarks not been made. [Citations.] In making this determination, reference must be made to the content of the language used, its relation to the evidence, and the effect of the argument on the rights of the accused to a fair and impartial trial. [Citations.] As previously noted, every reasonable assumption must be indulged in that the trial judge has performed his duty and properly exercised the discretion vested in him. [Citation.]" Manley, 222 Ill. App. 3d at 908.

Here, we conclude that the jury would not have reached a contrary verdict absent the comment made by the prosecution. The comment was based upon evidence established at trial and was used in response to an attack on Holmes' credibility. We do not find the comment adversely impacted defendant's right to a fair trial.

Finally, the trial judge struck the comment in question. In the colloquy, cited above, the trial court clearly sustains the objection to the comment raised by defense counsel. "Generally, a timely objection, followed by the court's sustaining the objection and instructing the jury to disregard the improper evidence will cure the error." People v. Wolf, 178 Ill. App. 3d 1064, 1067, 534 N.E.2d 204 (1989). The record also reveals that the trial judge informed the jury that closing arguments are argument only

and are not to be considered evidence. Given the above facts, we determine that the comment made by the prosecution was proper as it was based on the evidence presented. Even if, however, the comment were to be construed as improper, it did not amount to reversible error.

We turn to the final question of whether defendant's sentence was excessive. Under the Unified Code of Corrections, the applicable sentencing range for first degree murder is between 20 years and 60 years. 730 ILCS 5/5-8-1 (a) (1). Defendant was sentenced to 45 years, imprisonment on the first degree murder conviction. Under the Unified Code of Corrections, the applicable sentencing range for attempted murder is between 6 and 30 years in the penitentiary. 720 ILCS 5/8-4(c)(1) (West 1996); 730 ILCS 5/58-1 (a)(3) (West 1996). Defendant received a consecutive sentence of 20 years' imprisonment on the attempted murder conviction.

We apply an abuse of discretion standard of review when evaluating a sentencing order. People v. Maldonado, 240 Ill. App. 3d 470, 485, 608 N.E.2d 499 (1992). Thus, defendant must demonstrate that the trial court abused its discretion in imposing a sentence. As stated by the supreme court, [O]ur decisions have firmly established that the imposition of a sentence is a matter of judicial discretion and that, absent an abuse of this discretion, the sentence of the trial court may not be altered upon review. [Citations.]" People v. Perruguet, 68 Ill. 2d 149, 153, 368 N.E. 2d 882 (1977); People v.Center, 198 Ill. App. 3d 1025, 1032, 556 N.E.2d 724 (1990) ; Maldonado, 240 Ill. App. 3d at 485; People v. Steffens, 131 Ill. App. 3d 141, 151, 475 N.E.2d 606 (1985) ; People V. Cooper, 283 Ill. App. 3d 86, 95, 669 N.E.2d 637 (1996). Moreover, when the sentence chosen by the

trial court falls within the statutory range permissible for the pertinent criminal offense for which the defendant has been convicted, the sentence will not be disturbed absent an abuse of discretion. People v. Jones, 168 Ill. 2d 367, 373, 659 N.E.2d (1995). We note that the trial judge sentenced defendant within the applicable range for the convictions of first degree murder and attempted murder.

Defendant contends that the trial court abused its discretion in sentencing him because it improperly weighed several mitigating factors such as the absence of any prior criminal or delinquency record. Further, defendant notes that he has led otherwise a law abiding life and has an excellent family background. In addition, defendant points out that he has demonstrated the ability to provide for his infant son and that the criminal conduct engaged in by him is unlikely to recur.

As authority for the proposition that the above mitigating factors warrant a reduction of his sentence, defendant relies on several cases where the trial court was found to have abused its discretion by imposing an excessive sentence. People v. Brown, 243 Ill. App. 3d 170, 176, 612 N.E.2d 14 (murder sentence reduced based on young age of defendant, lack of criminal history, and rehabilitative potential); Maldonado, 240 Ill. App. 3d at 484 (murder sentence reduced based on defendant's young age and no prior felony convictions); People v. Hopkins, 247 Ill. App. 3d 951, 965, 618 N.E.2d 279 (1992) (murder sentence reduced based on defendant's young age, lack of criminal background, and potential for rehabilitation); People v. Carini, 151 Ill. App. 3d 264., 287, 502 N.E.2d 1206 (1986) (two counts of a concealment of homicidal death reduced based on defendant's young age, employment history, and minimal criminal record);

People v. Williams, 62 Ill. App. 3d 966, 975, 379 N.E.2d 1268 (197B)(defendant's battery, murder, and robbery sentences reduced based on young age, mental condition, and socioeconomic background); People v. Goodwin, 83 Ill. App. 3d 203, 207, 403 N.E.2d 1051 (1980) (attempted murder sentence reduced based on defendant's lack of criminal background, mental condition, and potential for rehabilitation); People v. Norfleet, 259 Ill. App. 3d 381, 396-97, 630 N.E.2d 1231 (1994) (defendant's consecutive 25 year prison terms for conviction on four counts of aggravated criminal sexual assault reduced based on defendant's rehabilitative potential and lack of prior felony conviction).

While we have examined the authority cited by defendant above, the supreme court has rejected the use of comparative sentencing from unrelated cases as a basis for claiming that a particular sentence is excessive or that the trial judge abused his discretion. People v. Fern, 189 Ill. 2d 48, 62, 723 N.E.2d 207 (1999). "If a sentence is appropriate given the particular facts of that case, it may not be attacked on the ground that a lesser sentence was imposed in a similar, but unrelated, case." Fern, 189 Ill. 2d at 62. Thus, we are not persuaded by the comparison of sentences imposed in the unrelated authority defendant relies on above as a basis for reducing the sentence imposed by the trial judge in this case.

It is clear from the record that the trial court considered several factors in determining defendant's sentence. In aggravation, the court allowed the victim impact statement of Samuel Davis, Mary Harris' common law husband, into the record. In mitigation, the judge heard the testimony of three witnesses. Gladys Freelon, defendant's fourth grade teacher, testified that defendant

was cooperative, hard working, friendly, and dedicated to school. Velma Blount, defendant's mother, testified that defendant was very close to her, could make her laugh, and was always there for her. Walter Blount Sr., defendant's father, stated that defendant was a nice kid, was helpful around the house, and was committed to caring for his infant son.

The trial court also recognized defendant's education, employment, and family background. The court specifically recognized, in mitigation, defendant's young age and absence of any prior criminal history. Further, the court noted that the defendant did not pull the trigger.

In aggravation, the court considered the fact that, while defendant did not pull the trigger, he provided an opportunity for the shooting to occur. In addition, the trial judge noted that a weapon was obtained with the specific intent to commit a crime. The court further pointed out that defendant's conduct resulted in serious injury to an individual and the death of a senior citizen which amounted to a great deal of suffering. The court also determined that the sentence was necessary to deter others from committing the same offense. As correctly noted by the State, "the seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors such as the lack of a prior record, and the [sentencing] statute does not mandate that the absence of aggravating factors requires the minimum sentence be imposed. [Citation.]" People v. Redmond, 265 Ill. App. 3d 292, 307, 637 N.E.2d 526 (1994).

Our supreme court has also stated:

> "A trial judge is in a far better position than an appellate court to fashion an appropriate sentence, because such judge can make a reasoned judgment based on firsthand consideration of such factors as 'the defendant's credibility, demeanor, general moral character, mentality, social environments, habits, and age. [Citations.]" People v. Streit, 142 Ill. 2d 13, 19, 566 N.E.2d 1351 (1991).

In addition, this court has held that "the trial court is not required to articulate its consideration of mitigating factors [citation] or to make an express finding that the defendant lacked rehabilitative potential [citation]. Nor is the trial court required to accord greater weight to defendant's potential for rehabilitation than the seriousness of the crime. [Citations.] 11 225 Ill. App. 3d 3311 335-36, 587 N.E.2d 1221 (1992).

In conformity with the above principles, we are not prepared to disturb the trial court's sentences imposed upon defendant under the facts in this case. "The reviewing court will find an abuse discretion only if the judgment of the trial court is manifestly unjust or palpably erroneous. I [Citation.]" People v. Dotson, 214 Ill. App. 3d 637, 648, 574 N.E.2d 143 (1991). The record reveals that the trial court, among other things, considered the defendant's age, lack of criminal history, and rehabilitative potential. These mitigating factors were balanced against the aggravating factors of the seriousness of the offense and the need to deter others from committing such a crime. In our view, the sentences imposed were not manifestly unjust or palpably erroneous. "A reviewing court may not substitute its

judgment for that of a sentencing court merely because it would have weighed the factors differently. Streit, 142 Ill. 2d at 19. We further recognize, as noted above, that the sentences imposed on defendant were well within the sentencing range set forth in the applicable statutes. We therefore conclude that the trial court did not abuse its discretion in sentencing defendant to consecutive prison terms of 45 years' imprisonment for his conviction of first degree murder and 20 years' imprisonment for his conviction of attempted murder.

The defendant's convictions and sentences are affirmed.

Affirmed.

McBRIDE, J., with GORDON and COUSINS, JJ., concurring.

People State of Illinois, respondent, v. Walter Blount, petitioner.

No. 92044

SUPREME COURT OF ILLINOIS

2001 Ill. LEXIS 1366

October 3, 2001, Decided

NOTICE: THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE 21 DAY PETITION FOR REHEARING PERIOD. DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Leave to appeal, Appellate Court, First District. (1-99-2420).

OPINION:

Petition for leave to appeal denied.